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No. 09-1377

In the Supreme Court of the United States

THE STATE OF OHIO,

Petitioner,

v.

ANTWAUN SMITH,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITIONER'S REPLY BRIEF

STEPHEN K. HALLER*
PROSECUTING ATTORNEY
ELIZABETH A. ELLIS
ASSISTANT PROSECUTING ATTORNEY
GREENE COUNTY PROSECUTOR'S OFFICE
61 GREENE STREET, SECOND FLOOR
XENIA, OH 45385
(937) 562-5250
shaller@co.greene.oh.us

* *Counsel of Record*
Counsel for Petitioner

September 9, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTRODUCTION

The Respondent contends that certiorari should not be granted in the case because the State of Ohio's claim of conflict is not mature, and this Court needs to let the issue percolate in the lower courts before passing upon the issue of whether it is reasonable to search a cell phone as a container incident to arrest. However, any further delay of this issue will lead to untenable and inconsistent application of the Fourth Amendment across the nation with regard to searches of cellular phones. Presently, law enforcement must follow different protocol regarding a search of a cell phone incident to arrest in pursuit of a criminal suspect in Kentucky than if that suspect crosses the Ohio River into Ohio.

Respondent also maintains that this Court should await further technological developments in smart phones before it passes on this issue. However, this argument ignores the fact that not every citizen has smart phones, and many criminals use basic phones to commit crimes. Further, it is respectfully submitted that cellular phone technology will continue to evolve and there will never be a time when there is a national standard. Moreover, the potential capabilities of a cell phone are not at issue in this case, just its capabilities as an address book and recent call log. Most importantly, it is becoming increasingly important for this Court to address the status of a cell phone found on a person incident to arrest, as there are more than 285,000,000 wireless cellular phone subscriptions in this county, which is nearly 91 % of the nation's

population.[1] There is no consistency regarding this increasingly popular technology, and law enforcement needs this Court's guidance.

The record below is sufficient to warrant this Court's review, as it clearly establishes that the search of the cell phone was conducted incident to the Respondent's lawful arrest. The issue is whether the phone is a container capable of being searched without a warrant, or whether law enforcement must separately obtain a warrant after seizure of the phone from the Respondent's person. The Ohio Supreme Court's flawed analysis of this issue misconstrues traditional Fourth Amendment principles to prohibit some imaginary future invasion of privacy that is not at issue in this case.

Under these circumstances, the Petition should be granted, the ruling of the Ohio Supreme Court overturned, and this matter remanded for further proceedings.

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[1] 2009 CTIA-The Wireless Association®'s Semi-Annual Wireless Industry Survey, http://files.ctia.org/pdf/CTIA_Survey_Year_End_2009_Graphics.pdf

I. IN THE INSTANT CASE, THE OHIO SUPREME COURT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT DIRECTLY AND INTOLERABLY CONFLICTS WITH THE UNITED STATES COURTS OF APPEALS AND THE SUPREME COURT OF CONNECTICUT, SUBJECTING LAW ENFORCEMENT AGENCIES TO INCONSISTENT MANDATES.

The holding of the Ohio Supreme Court that a cell phone is not a container and that, "the warrantless search of data within a cell phone seized incident to a lawful arrest is prohibited by the Fourth Amendment when the search is unnecessary for the safety of law enforcement and there are no exigent circumstances" is in direct conflict with decisions Fifth and Fourth Circuit Courts of Appeal, which have held that cell phones are containers and may be searched incident to lawful arrest for evidence preservation. *State v. Smith*, 124 Ohio St. 3d 163, 2009-Ohio-6426; *cf. United States v. Finley*, 477 F.3d 250 (C.A. 5, 2007); *United States v. Murphy*, 522 F.3d 405 (C.A. 4, 2009). Further, the Supreme Court of Connecticut has also held that a cell phone found on the front passenger seat of a defendant's car when that defendant is arrested is a container a capable of being searched without a warrant. *State v. Boyd*, 922 A.2d 1071 (Conn. 2010). While the *Boyd* case was decided under the automobile exception to the warrant requirement, it is still relevant to the present inquiry as the court's analysis still turns on whether the cell phone can be searched as a container. Therefore, the argument of the Respondent that there is no clear conflict in authority must be rejected.

The Ohio Supreme Court decision below is specifically premised upon the majority's conclusion that a cell phone is not a container. Thus, the status of a cell phone as a container and when and whether it can be searched is unsettled and afforded disparate treatment throughout the nation. Law enforcement officers must now follow diverse Fourth Amendment protocols regarding cell phones depending on the jurisdiction and citizen are afforded different Fourth Amendment protections depending upon their state of residence and/ or the law enforcement agency investigating them. Moreover, this conflict is important and recurring as more than 285,000,000 Americans now have cell phone subscriptions. Every day, law enforcement officers across the country are arresting suspects who possess cell phones and those officers need guidance as to proper and consistent protocol for searching cell phones seized incident to arrest.

II. THE ISSUE OF WHETHER A CELL PHONE IS A CONTAINER AND IS CAPABLE OF BEING REASONABLY SEARCHED AS SUCH INCIDENT TO ARREST IS RIPE FOR THIS COURT'S REVIEW.

Respondent also maintains that this Court should not yet entertain the issue of whether a cell phone is a container for Fourth Amendment purposes because the capabilities of the cell phones at issue in these cases are not clear from the case law, and because the technology of the cell phone in this case was short-lived. The State of Ohio respectfully submits that this Court need not delve into abstract capabilities of

various cell phone technologies in order to decide this case.

The State of Ohio's very narrow request is for this Court to review the reasonableness of a search of a cell phone's address book/contact list and call log incident to arrest, where law enforcement has probable cause to believe that the phone contains evidence of the crime for which the suspect was arrested. It is axiomatic that all cell phones, from smart phones to disposable prepaid phones have the capabilities of storing frequently called numbers and recent calls made and received, have had these capabilities for some time, and will have them for the foreseeable future. Respondent's concern that the functions and capabilities of the cell phone in the instant case somehow relate to his privacy interest in the phone is simply misplaced because it is premised on the notion that those people who can afford more expensive and therefore more technologically advanced cell phones have a greater privacy interest and should be given greater constitutional protections than those who have more basic cell phones. The State of Ohio is not asking this Court to review the abstract capabilities of cell phones; rather Ohio is seeking this Court's ruling as to the status of cell phones within the Fourth Amendment. The factual determination as to what is a reasonable search turns on the conduct of the officers and facts of the crime known to the officer at the time of the search, not the capabilities of the item being searched. Most containers are capable of storing myriad items, but whether they can be searched depends on the object's status as a container, not what it could hold. If this Court determines that cell phones are containers and can store evidence of criminal activity, then the phones may be reasonably searched

for that evidence without a warrant incident to arrest or if found in an automobile, regardless of their capabilities.

III. THE RECORD IN THE INSTANT CASE IS SUFFICIENT TO ADDRESS THE QUESTION PRESENTED.

The Respondent further complains that the record is unclear as to who searched the phone, where and when the phone was searched, and what components of the phone were searched. A more thorough review of the record below reveals that these questions are sufficiently answered to determine whether a cell phone may be searched incident to arrest.

First, both Detectives Polston and Molnar of the Beavercreek Police Department searched the Respondent's cell phone. Supp. Hr'g. Tr. 33; Trial Tr. 128, 327-328. Detective Polston also testified that he and Detective Molnar might have searched the phone initially at the scene, but he definitely remembered searching the phone when he first got to the police station. Supp. Hr'g. Tr. 33. It is further clear that the Detectives searched the recent calls and address book of the cell phone seized and documented the evidence of the calls Respondent placed to the informant's cell phone. Trial Tr. 128-132. Moreover, it is undisputed below that the cell phone was immediately associated with the person of the Respondent at the time of his arrest as it was held in his clothing and the trial court properly applied the reasoning of *United States v. Edwards*, 415 U.S. 800, 805 (1974), that once an accused has been lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of

arrest may lawfully be searched and seized without a warrant even after a substantial time lapse between the arrest and later administrative processing. Accordingly, the record is sufficient for this Court to address the status of a cell phone as a container to be searched incident to a lawful arrest.

Moreover, resolving the question presented is relevant to the ultimate outcome of the case. Without intervention from this Court, the Respondent's conviction will be vacated and the case will have to be reset for trial. Even though it is the position of the State of Ohio that the evidence obtained from the cell phone is corroborative, it is premature to suggest that a retrial would automatically end in the same result of conviction.

IV. THE DECISION OF THE OHIO SUPREME COURT IS FLAWED.

The decision of the Ohio Supreme Court is in error as it applied a flawed and archaic understanding of *New York v. Belton*, 435 U.S. 454 (1981) to the instant case. Moreover, it needlessly delves into abstract cell phone capabilities not at issue in the instant case to announce a sweeping new Fourth Amendment rule that is at odds with Circuit Courts of Appeal and the Supreme Court of Connecticut. The search at issue here is nothing more than a search of an electronic address book and call log. Beavercreek Police Detectives had probable cause to believe the Respondent's cell phone contained evidence of the crime for which he was arrested and reasonably searched the Respondent's cell phone incident to his arrest to look for that evidence.

CONCLUSION

Based upon the foregoing reasons, and those set forth more fully in the State of Ohio's Petition, the State of Ohio respectfully requests this Court grant its petition for a writ of certiorari.

Respectfully Submitted,

PROSECUTING ATTORNEY,
GREENE COUNTY, OHIO

STEPHEN K. HALLER (#0009172)
PROSECUTING ATTORNEY
Counsel of Record
Elizabeth A. Ellis (#0074332)
Assistant Prosecuting Attorney
61 Greene Street, Second Floor
Xenia, OH 45385
(937) 562-5250
shaller@co.greene.oh.us